No. 87-168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RUSSELL FRISBY, *et al.*,

Appellants,

v.

SANDRA C. SCHULTZ and ROBERT C. BRAUN,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR APPELLEES

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QUESTIONS PRESENTED

1. Whether this Court has appellate jurisdiction, under 28 U.S.C. § 1254(2), to review the affirmance, by an equally divided court of appeals, of an order granting a preliminary injunction.

2. Whether, in the absence of appellate jurisdiction, this Court should review a case in which the only question is whether the district court abused its discretion in granting a preliminary injunction.

3. Whether the district court exercised permissible discretion by preliminarily enjoining an ordinance banning any and all picketing before or about any residence or dwelling, and in particular:

   a. Whether an ordinance banning any and all picketing before or about any residence or dwelling likely violates the equal protection clause of the fourteenth amendment, when under state law the ordinance does not apply to certain labor picketing.

   b. Whether an ordinance banning any and all picketing before or about any residence or dwelling, including peaceful public issue picketing on public streets, likely violates the right to free speech under the first amendment.

PARTIES

The defendants in the district court, Russell Frisby, George R. Hunt, Robert Wargowski, Harlan Ross, Clayton A. Cramer, and the Town of Brookfield, are the appellants in this Court. Mr. Hunt, a public officer and party to this proceeding in his official capacity, has died, and been succeeded in office by Harry L. Behrens.

The plaintiffs in the district court, Sandra C. Schultz and Robert C. Braun, are the appellees in this Court.

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BRIEF FOR APPELLEES

STATEMENT OF THE CASE[1]

Appellees Sandra C. Schultz and Robert C. Braun are advocates of the right to life of all human beings, including children conceived but not yet born. J.S. at A-5. Benjamin M. Victoria, a resident of the Town of Brookfield, Wisconsin, destroys such children at abortion businesses in Milwaukee and Appleton, Wisconsin. J.S. at A-6.

[1] In this brief, "J.S." refers to the jurisdictional statement, "JA" refers to the joint appendix, and "R." refers to the record of docket entries.

Schultz, Braun, and other individuals picketed on several occasions on the public street outside Victoria's Brookfield residence.[2] J.S. at A-5 to A-6. The town board of the Town of Brookfield responded by enacting a ban on all residential picketing except for certain labor picketing. J.S. at A-7. Subsequently the town repealed that ordinance and replaced it with a flat ban on all "picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Town of Brookfield, Wis., Gen. Code § 9.17(2). J.S. at A-7 to A-9.

When the picketing ban became effective, Schultz and Braun ceased picketing for fear of arrest and prosecution under the anti-picketing ordinance. J.S. at A-10.

Schultz and Braun brought suit in federal district court, seeking injunctive and declaratory relief. JA-1. They named as defendants the three members of the town board, the chief of police, the town attorney, and the Town of Brookfield itself, all appellants before this Court. JA-2 to JA-3.

The U.S. District Court for the Eastern District of Wisconsin granted the motion of appellees Schultz and Braun (hereinafter, "the picketers") for a preliminary injunction, ordering

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[2] In her affidavit filed in the district court, appellee Schultz explained, JA-36 to 37, that she wished to picket in order to:

(a) express my opposition to abortion,
(b) inform those living in Victoria's neighborhood of the fact that Victoria performs abortions,
(c) express to Victoria my sincere and profound opposition to his performance of abortions,
(d) inform those living in the area and all who learn of the picketing that abortion is a matter of concern for local communities and not just an abstract and distant political matter,
(e) communicate my opposition to abortion in a location at which my efforts will least interfere with the efforts of sidewalk counselors to contact prospective abortion clients,
(f) exercise and express my support for the right to freedom of expression on public streets and sidewalks.

Appellee Braun expressed similar concerns. *See* JA-29 to JA-30 (Affidavit of Robert C. Braun).

appellants (hereinafter collectively referred to as "the town") not to enforce the Brookfield picketing ban. *Schultz v. Frisby,* 619 F. Supp.792 (E.D. Wis. 1985). *See* J.S. at A-3 to A-23. The order of the district court provided that "if the defendants do not appeal and the court does not receive within sixty days . . . a request in writing from either party for a trial on the plaintiffs' request for a permanent injunction," the preliminary injunction would become permanent without further notice. J.S. at A-23.

The town submitted a timely written request for a trial on the picketers' request for a permanent injunction, R.43,[3] and simultaneously appealed the order granting a preliminary injunction, R.42.

A panel of the U.S. Court of Appeals for the Seventh Circuit, by a 2-1 vote, affirmed. *Schultz v. Frisby,* 807 F.2d 1339 (7th Cir. 1986). *See* JA-85 to JA-208. At the request of the town, the Seventh Circuit subsequently agreed to rehear the case en banc, and vacated the panel decision for this purpose. 818 F.2d 1284 (7th Cir. 1987). *See* J.S. at A-2. Finally, the en banc court affirmed, by an equally divided court, the judgment of the district court. 822 F.2d 642 (7th Cir. 1987). *See* J.S. at A-1 to A-1-b.

The town then appealed to this court, which postponed further consideration of the question of jurisdiction to the hearing of the case on the merits. *Frisby v. Schultz,* 108 S. Ct. 692 (1988).

SUMMARY OF ARGUMENT

This case involves the review of a preliminary injunction. Appellees (the picketers) brought suit in federal district court challenging a town ordinance banning picketing "before or about the residence or dwelling" of any individual. The district court issued a preliminary injunction ordering appellants (the town) not to enforce the anti-picketing ordinance.

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[3] The district court has stayed the trial pending the town's appeal of the preliminary injunction. R.45.

The court of appeals affirmed the district court order by an equally divided court, and the town has attempted to appeal to this Court.

The Court does not have appellate jurisdiction over the present case, and therefore should dismiss the appeal. Treating the attempted appeal as a petition for a writ of certiorari, the Court should deny the petition. If the Court decides to grant certiorari, it should affirm the judgment of the court of appeals. The district court did not abuse its discretion in issuing a preliminary injunction, and hence the court of appeals properly affirmed the district court.

Appeal jurisdiction does not lie in the present case. The statute which the town invokes in support of its appeal, 28 U.S.C. § 1254(2), does not apply unless two requirements are met: first, there must be a final judgment for review, *Thornburgh v. American College of Obstetricians and Gynecologists, Pennsylvania Section*, 106 S. Ct. 2169, 2175-76 (1986); and second, the court of appeals must have squarely held that a state law (or municipal ordinance) is unconstitutional, *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 470 n.12 (1985). The town's attempted appeal satisfies neither requirement. The district court granted only preliminary relief, and the town has requested a trial on the merits of the case; hence, there is no final judgment. Moreover, the district court merely held that the ordinance was "likely to fail" the test of constitutionality. The court of appeals affirmed by an equally divided court, and without an opinion; its decision, therefore, only stands for the proposition that the district court did not abuse its discretion in granting preliminary injunctive relief. The court of appeals did not hold the challenged ordinance unconstitutional. This Court should accordingly dismiss the appeal for want of jurisdiction.

Treating the town's defective appeal as a petition for a writ of certiorari, the Court should deny the petition. The only question properly before this Court is whether the district court abused its discretion in granting preliminary relief. The sharply abbreviated record, moreover, makes this case an inappropriate vehicle for the town's challenges to established first amendment jurisprudence.

If this Court chooses nevertheless to grant certiorari, it should affirm the judgment of the court of appeals. In reviewing a preliminary injunction, an appellate court need only determine whether the district court abused its discretion in granting relief.

In this case the district court properly concluded that the picketers were entitled to a preliminary injunction. The court found that: the picketers faced irreparable injury from the denial of their freedom to engage in expressive activity; this injury outweighed any apparent injury to the town; a preliminary injunction would not disserve the public interest; and, the picketers were reasonably likely to prevail on the merits of their challenge to the anti-picketing ordinance.

The town has only seriously contested the district court's conclusion that the picketers were likely to succeed on the merits of their case.

The district court, however, had more than ample grounds for concluding that the picketers were reasonably likely to succeed on the merits of their challenge to the Brookfield picketing ban.

In the first place, the Brookfield ban likely violates the equal protection clause of the fourteenth amendment. A law which generally prohibits residential picketing but which does not apply to certain labor picketing impermissibly discriminates on the basis of the content of the picketer's message. *Carey v. Brown*, 447 U.S. 455 (1980). Although the Brookfield ordinance purports to prohibit all residential picketing whatsoever, the town is powerless, under state law, to forbid activity authorized by state statute. Wisconsin labor law explicitly protects the peaceful picketing, on public streets, of a place of employment involved in a labor dispute. Wis. Stat. § 103.53(1). This statute applies when the place of employment is a residence. *Senn v. Tile Layers Protective Union*, 222 Wis. 383, 268 N.W.2d 270 (1936), *aff'd*, 301 U.S. 468 (1937). Consequently, the Brookfield ordinance cannot apply to certain residential labor picketing, and its application to nonlabor picketers violates the equal protection clause.

Secondly, the Brookfield picketing ban likely violates the right to free speech under the first and fourteenth amendments. Peaceful picketing is expressive activity receiving first amendment protection. Moreover, residential streets constitute public fora. *Carey v. Brown.*

The ability of a governmental body to restrict expressive activity in a public forum is sharply limited. It may enforce reasonable time, place, and manner regulations, but such regulations must be content-neutral, must be narrowly tailored to further a significant government interest, and must allow for ample alternative channels of communication. *United States v. Grace,* 461 U.S. 171, 177 (1983). As the district court correctly held, the Brookfield picketing ban is not narrowly tailored to further a significant government interest.

The Brookfield ban bears no logical relationship to the town's asserted interest in safety: it arbitrarily singles out and prohibits a form of expressive activity — picketing — rather than evenhandedly regulating pedestrian traffic in response to genuine threats to safety.

The town's asserted interest in residential privacy, meanwhile, is limited primarily to the home and, to a lesser extent, to the surrounding private property. Privacy concerns do not provide an adequate basis for outlawing peaceful, expressive activity in a public forum.

Finally, the Brookfield ban does not limit itself to abusive conduct that actually threatens legitimate governmental interests; instead, the ordinance broadly prohibits picketing. As a flat ban on expressive activity, the Brookfield ordinance runs afoul of a long line of decisions rejecting broad prophylactic rules and requiring precision of regulation in the area of first amendment freedoms.

This Court should dismiss the appeal for want of jurisdiction, and, treating the defective appeal as a petition for a writ of certiorari, deny the petition. In the alternative, the Court should affirm the judgment of the court of appeals.

ARGUMENT

Before this Court is an attempted appeal from a judgment of a court of appeals. That court affirmed a district court decision to grant a preliminary injunction, and remanded the case for further proceedings. The underlying litigation involves a constitutional challenge, by two picketers (appellees), to an ordinance making it "unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Town of Brookfield, Wis., Gen. Code § 9.17(2).

The Court lacks appellate jurisdiction over the town's (appellants') appeal, and should therefore dismiss that appeal. Treating the appeal as a petition for a writ of certiorari, this Court should deny the petition. If the Court decides to grant the petition, it should affirm the judgment of the court of appeals.

I. THIS COURT DOES NOT HAVE APPELLATE JURISDICTION OVER THE PRESENT CASE.

The town invokes 28 U.S.C. § 1254(2) as the basis for its appeal to this Court. That statute, however, does not authorize an appeal in the present case because there has been no final judgment, and because the court of appeals has not squarely held the municipal ordinance in question to be unconstitutional.

Section 1254(2) provides for "appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution . . . ." This provision imposes two requirements, relevant to the case at bar, before an appeal will lie: first, there must be a final judgment; and second, the court of appeals must actually have held unconstitutional some state or local law. The town's attempted appeal fails to satisfy either requirement.

A. *There is No Final Judgment.*

This Court recently held that finality is a definite requirement for an appeal under section 1254(2). The present case, however, involves an appeal from a judgment affirming a preliminary injunction and remanding the case for further proceedings, such as a trial. Hence, there is no final judgment, and no basis for appellate jurisdiction.

In *Thornburgh v. American College of Obstetricians and Gynecologists, Pennsylvania Section*, 106 S. Ct. 2169 (1986), this Court authoritatively settled the question whether section 1254(2) applies in the absence of a final judgment:

> We have concluded that it is time that this undecided issue be resolved. We therefore hold, on the reasoning of *McLish v. Roff*, 141 U.S. [662, 665-68 (1891)], that in a situation . . . where the judgment is not final, and where the case is remanded for further development of the facts, we have no appellate jurisdiction under § 1254(2).

106 S. Ct. at 2176.

There is no final judgment in the case at bar. The district court has only granted the picketers' request for a preliminary injunction; it has not ruled on the ultimate merits of the case. Indeed, the court explicitly presented the town with the option of requesting a trial on the issue of a permanent injunction. 619 F. Supp. at 798. *See* J.S. at A-23. The town has exercised that option, R. 43, and thus fully retains the right to resist a final judgment in favor of the picketers.

When the court of appeals affirmed the district court, it remanded the case for "any further proceedings deemed necessary." 822 F.2d 642. *See* J.S. at A-1. Obviously, the town remains free to pursue a trial in the district court.

The present case therefore does not satisfy the finality requirement of section 1254(2).

B. *The Court of Appeals Has Not Squarely Held the Brookfield Picketing Ban to be Unconstitutional.*

"Jurisdiction under 28 U.S.C. § 1254(2) is properly invoked only where a court of appeals *squarely* has 'held' that a state statute is unconstitutional on its face or as applied; jurisdiction does not lie if the decision might rest on other grounds." *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 470 n.12 (1985) (citation omitted) (emphasis in original). Although the municipal ordinance at issue in the present case is a "State statute" for purposes of section 1254(2), *see City of New Orleans v. Dukes*, 472 U.S. 297, 301 (1976) (per curiam), the court of appeals has by no means "squarely held" the challenged ordinance to be unconstitutional.

In *Burger King*, the parties had stipulated to a particular construction of a Florida statute, and the court of appeals held the statute, as so construed, to be unconstitutional. 471 U.S. at 470 n.12. This Court found itself without appellate jurisdiction solely because of a possible difference between the stipulated scope and the actual reach of the state law. *Id.* "Consistent with 'our practice of strict construction' of § 1254(2), . . . we believe that . . . it must be reasonably clear that the court independently concluded that the challenged statute governs the case and held the statute itself unconstitutional as so applied." *Id.* (quoting *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (per curiam)). *Accord Doran v. Salem's Inn*, 422 U.S. 922, 927 (1975).

In *Doran*, this Court dismissed an attempted appeal from the affirmance of a preliminary injunction. The Court noted that in reviewing a preliminary injunction, the appellate court need only have found "a sufficient showing of the likelihood of ultimate success on the merits," 422 U.S. at 932, and need not have ruled upon the "ultimate merits" of the case, *id.* at 934. Since the court of appeals "considered the merits only for the purpose of ruling on the propriety of preliminary injunctive relief," *id.* at 927, this Court was "less than completely certain that the Court of Appeals did in fact hold [the ordinance] to be unconstitutional," *id.*

In the present case, the district court explicitly limited its decision to a conclusion that the challenged ordinance was "likely" to fail the governing constitutional standard, and that the picketers were therefore "reasonably likely" to succeed on the merits of their claim. 619 F. Supp. at 798. *See* J.S. at A-22. The court of appeals affirmed, without opinion, by an equally divided court. 822 F.2d 642. *See* J.S. at A-1 to A-1-b. There is therefore no basis for concluding that the court of appeals decided anything more than that the district court did not abuse its discretion by granting preliminary injunctive relief. *See Schultz v. Frisby*, 807 F.2d 1339, 1343 (7th Cir. 1986) (original panel opinion) (applying abuse of discretion standard). *See* JA-100. *Cf. Doran*, 422 U.S. at 934.

The decision of the court below did not "squarely hold" the Brookfield picketing ban to be unconstitutional; hence, no appeal from that decision lies under 28 U.S.C. § 1254(2).

The town's appeal is deficient both because of a lack of finality and the absence of a holding that the challenged ordinance is unconstitutional. This Court should therefore dismiss the appeal for want of jurisdiction.

II. TREATING THE DEFECTIVE APPEAL AS A PETITION FOR CERTIORARI, THIS COURT SHOULD DENY CERTIORARI.

Congress has provided that when this Court faces an unsuccessful attempt to appeal from a decision of the United States court of appeals, "the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari . . ." 28 U.S.C. § 2103. Treating the present appeal as a petition for certiorari, this Court should deny the petition.

At the present stage of the litigation, the only question before the Court is whether the district court exercised proper discretion in granting a preliminary injunction. The court of appeals correctly answered this question in the affirmative, and therefore the matter is not of sufficient importance to merit review.

Furthermore, the town rests its appeal upon calls for major revisions in first amendment jurisprudence. These revisions are unwarranted, and in any event the present record is insufficiently comprehensive and detailed to support a reexamination of, much less a departure from, the settled decisions of this Court.

A. *The Only Question for Review is Whether the District Court Exercised Permissible Discretion in Granting a Preliminary Injunction.*

The only question now before this Court is whether the district court properly granted preliminary injunctive relief.[4]

In reviewing a preliminary injunction, this Court need only determine whether the district court abused its discretion. This deferential standard of review is especially appropriate in the case at bar, which presents a limited record.

When a preliminary injunction is at issue, "the standard of appellate review is simply whether the issuance of the injunction, in the light of the applicable standard [for preliminary injunctive relief], constituted an abuse of discretion." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975) (citation omitted) (affirming appeal from affirmance of preliminary injunction). *Accord Brown v. Chote*, 411 U.S. 452, 457 (1973) (affirming preliminary injunction) ("In reviewing such

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[4] The town, both in its statement of the questions presented and throughout its brief to the Court, treats the present case as if the lower federal courts have finally and definitively resolved the litigation on the merits. This is simply not true.

In the first place, the district court ruled only on the propriety of a preliminary injunction. The court explicitly limited its discussion of the merits to an assessment of the likelihood of the picketers' ultimate success. *See* 619 F. Supp. at 798. J.S. at A-22. In the second place, the district court explicitly recognized the town's (and the picketers') right to demand a trial on the question of a permanent injunction. 619 F. Supp. at 798. J.S. at A-23. The town has availed itself of this option and requested a trial. R. 43.

The court of appeals, for its part, merely affirmed the preliminary injunction and remanded the case "for any further proceedings deemed necessary." 822 F.2d at 642. J.S. at A-1.

interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion") (and cases cited).

This Court has recently recognized the possibility of exceptions to this approach, *see Thornburgh v. American College of Obstetricians and Gynecologists, Pennsylvania Section*, 106 S. Ct. 2169, 2176-77 (1986);[5] nonetheless, "limited review normally is appropriate," *id.* at 2176, and thus "ordinarily" the "abuse of discretion" rule will apply, *id.* at 2177. *See also id.* at 2192 n.1 (White, J., dissenting) (plenary review "may, in rare cases, be an appropriate course of action where the consitutional issues are clear," but "this is by no means the preferred course of action in the run of cases, and I assume that the majority's opinion is not to the contrary"); *id.* at 2207-13 (O'Connor, J., dissenting) (criticizing departure from abuse of discretion standard).

The present case fits within the normal pattern of appeals from preliminary injunctions. In *Thornburgh*, the Court indulged in plenary review when it had before it " 'an unusually complete factual and legal presentation from which to address the important constitutional issues at stake.' " 106 S. Ct. at 2177 (quoting the decision of the court of appeals). In contrast, the case at bar presents only a limited record consisting primarily of affidavits and proposed statements of agreed facts. The town has requested a trial on the merits of the case, R. 43, but none has yet taken place.

Thus, the only issue for review is whether the district court abused its discretion. The court of appeals properly upheld the district court order, *see infra* § III; hence, review in this Court is unwarranted.

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[5] In *Thornburgh*, this Court held that the rule limiting review of preliminary injunctions to abuse of discretion "is a rule of orderly judicial administration, not a limit on judicial power." *Id.* at 2177. The *Thornburgh* Court indicated that plenary review of a case could be appropriate when "the unconstitutionality of the particular state action under challenge is clear." *Id.* at 2176. In particular, if the "District Court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling *may* be reivewed even though the appeal is from the entry of a preliminary injunction." *Id.* at 2177 (emphasis added)

B. *The Town's Appeal Rests Primarily Upon Challenges to Established First Amendment Jurisprudence; Such Challenges Lack Merit, and the Present Record Does Not Facilitate Reexamination of, Much Less Departure From, Settled Precedent.*

In support of its appeal, the town launches attacks upon the prior decisions of this Court. These attacks are without merit; moreover, in light of the present state of the record, this case simply does not provide a proper vehicle for a reexamination of, much less a departure from, settled first amendment jurisprudence.[6]

In essence, the town bases its appeal upon two radical propositions: first, that residential streets in the Town of Brookfield do not constitute public forum property under the first amendment, Brief for Appeallants at 21-21; and second, that picketing, even peaceful picketing by a solitary individual on a public way, is inherently and unacceptably destructive of residential privacy, *id.* at 37. Both of these arguments fly in the fact of numerous decisions by this Court, and both presuppose factual situations which the record does not support.

The town's argument, for example, that its residential streets are not public fora, presupposes, *see infra* § III(B)(2)(b), that the streets in the Town of Brookfield differ in a dramatic and unprecedented fashion from the streets of other municipalities. The town, however, has presented neither evidence nor authority to support this proposition.

Similarly, the town's argument, that a single, solitary picketer on a public street inherently disrupts residential privacy to an intolerable degree, rests upon factual assumptions about picketing that this Court has never indulged, and that the present record does not support.

At present, the record consists almost entirely of affidavits and proposed statements of agreed facts. There is only minimal evidence regarding the streets in question, none of

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[6] Indeed, this Court need not even reach the first amendment issues in order to sustain the decisions of the courts below. *See infra* § III(B)(1).

which suggests that these streets differ in dramatic and important ways from other residential streets. There is likewise only anecdotal, and disputed, evidence regarding previous picketing incidents, none of which remotely suggests that picketing in the Town of Brookfield is inherently very much different from the picketing protected in other decisions of this Court.

If the town wishes to pursue its revolutionary arguments, it should attempt to identify, if it can, a solid factual basis for them. The proper forum for such a course of action is the district court, not the Supreme Court.

The picketers do not dispute the importance of the constitutional rights and interests underlying the litigation at bar. In its present posture, however, and on its present record, the case does not provide a proper vehicle for the reexamination and revision of first amendment jurisprudence. Since the town's appeal hinges upon such revisions, this court should deny review.[7]

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[7] Should this case go to trial, the picketers of course would also retain the right to explore additional arguments and supplement the record in support of their claims. For example, the picketers would likely use a trial as an opportunity to raise vagueness claims. The town concedes that a protest march through the Town of Brookfield would be lawful, Brief for Appellants at 41, but does not explain the difference between a march and a picket. A trial would enable the parties to determine whether any coherent distinction may be made between picketing and other concededly lawful expressive activities.

In addition, a trial would enable the picketers to test the strength of the town's assertions regarding safety and privacy interests. The district court held that the Brookfield ordinance was likely to fail the constitutional requirement that regulations of expressive activity be narrowly tailored to further legitimate government interests. 619 F. Supp. at 797. J.S. at A-18. In a full-scale trial, the picketers could explore a number of questions in this regard: Is peaceful picketing any more intrusive than door-to-door canvassing? Did the people who complained about the picketers in this case object to the picketing itself, or only to the picketers' message? Does a solitary picketer actually pose a safety threat that is at all different from the threat posed by other pedestrians or by parked cars?

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A PRELIMINARY INJUNCTION.

Should the Court decide to grant review of this case, it should affirm the judgment of the court of appeals, which upheld the district court order granting a preliminary injunction. The only issue on review is whether the district court exercised permissible discretion.

In the present case, the district court applied the proper test for determining whether to grant preliminary injunctive relief. The court did not abuse its discretion in applying that standard to the record before it, and thus the court of appeals correctly affirmed the district court decision.

A. *The District Court Employed the Correct Standard for Granting Preliminary Injunctions.*

The district court in the present case held the picketers to the following standard for preliminary injunctive relief:

> A district court may issue a preliminary injunction only after the moving party demonstrates that —
>
> > (a) it has at least a reasonable likelihood of success on the merits, (2) it has no adequate remedy at law and will otherwise be irreparably harmed, (3) the threatened injury to it outweighs the threatened harm the preliminary injunction may cause the defendants, and (4) the granting of the preliminary injunction will not disserve the public interest.

Schultz v. Frisby, 619 F. Supp. 792, 795-96 (E.D. Wis. 1985) (quoting *Syntex Opthalmics, Inc. v. Tsuetaki,* 701 F.2d 677, 681 (7th Cir. 1983)) (additional citation omitted). J.S. at A-13. That standard is certainly proper, being at least as stringent as that required by this Court. *See, e.g., Doran,* 422 U.S. at

931 ("The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits"); *Brown*, 411 U.S. at 456 (trial court properly weighed "the possibilities of success on the merits" and "the possibility that irreparable injury would have resulted, absent interlocutory relief").

B. *The District Court Correctly Applied the Governing Standard to the Present Case.*

The district court correctly found that preliminary injunctive relief was proper in the case at bar.

The court held that the picketers, facing the loss of the freedom to picket, were clearly threatened with irreparable injury. 619 F. Supp at 796. J.S. at A-14. *See Elrod v. Burns*, 427 U.S. 7, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") (citations omitted). The court also held that, under the facts before it, the injury to the picketers outweighed the possible harm to the town. 619 F. Supp. at 796 ("[t]he injury the defendants would sustain by virtue of a preliminary injunction seems relatively small"). J.S. at A-14. Moreover, the court found, again on the record before it, that "[g]ranting the injunction would not disserve the public interest." 619 F. Supp. at 796. J.S. at A-14.

The town has not seriously contested, either in the trial court or on appeal, the conclusions of the district court regarding these three elements of the standard for preliminary injunctions. Rather, as the district court noted, the "only real issue here is whether plaintiffs are reasonably likely to succeed on the merits." 619 F. Supp. at 796. J.S. at A-14 to A-15.

The district court had more than sufficient basis for concluding that the picketers were likely to succeed on the merits of their challenge to the Brookfield picketing ban. Therefore, the district court did not abuse its discretion in granting a preliminary injunction.

1. *The Brookfield ban on residential picketing likely violates equal protection because, by operation of state law, the ordinance does not apply to certain labor picketing.*

The picketers are likely to succeed on their challenge to the Brookfield picketing ban because that ban likely denies the picketers the equal protection of law in contravention of the fourteenth amendment to the United States Constitution.

Although the ordinance, standing alone, allows for no exceptions, the town is powerless, under state law, to outlaw the peaceful residential labor picketing of a place of employment involved in a labor dispute. Hence the Brookfield ordinance, by operation of state law, can only apply in a manner that discriminates on the basis of the content of the picketers' message. Under *Carey v. Brown*, 447 U.S. 455 (1980), such discrimination violates the equal protection clause of the fourteenth amendment.

The key questions for purposes of equal protection analysis are as follows: First, does a law that generally bans residential picketing violate the equal protection of the laws if it does not apply to the peaceful picketing of a place of employment involved in a labor dispute? This Court answered that question in the affirmative in *Carey*. Second, *is the peaceful picketing of a place of employment involved in a labor dispute permitted in the Town of Brookfield*, notwithstanding the terms of the Brookfield ordinance generally banning residential picketing? As a matter of state law, the answer is clearly "yes".

As a consequence, the Brookfield picketing ban operates in precisely the same unconstitutionally discriminatory manner as the statute this Court struck down in *Carey*.

a. *The differing treatment of labor and nonlabor picketing on residential streets constitutes invidious discrimination against protected expression.*

A law which restricts peaceful picketing on residential streets and sidewalks, but which does not apply to certain labor picketing, violates the equal protection clause of the fourteenth amendment.

In *Carey v. Brown*, 447 U.S. 455 (1980), this Court invalidated a statute which prohibited residential picketing in most instances, but which did not apply to the peaceful picketing of a place of employment involved in a labor dispute.[8] *See id.* at 457. The Court noted that "peaceful picketing on the public streets and sidewalks in residential neighborhoods [constitutes] expressive conduct that falls within the First Amendment's preserve." *Id.* at 460 (citation omitted). The Illinois regulatory scheme, by "exempting from its general prohibition only the 'peaceful picketing of a place of employment involved in a labor dispute,' . . . discriminate[d] between lawful and unlawful conduct based upon the content of the demonstrator's communication." *Id.* (footnote omitted). Such content-based discrimination violated the equal protection clause, the Court held, since the legislation was not "finely tailored to serve substantial state interests." *Id.* at 461-62. Neither the interest in residential privacy, *id.* at 464-65, nor the interest in special protection for labor protests, *id.* at 466-67, nor any combination of these, *id.* at 467-69, sufficed to justify such discriminatory regulation of picketing; thus, the Illinois anti-picketing statute was unconstitutional.

The rule of *Carey* did not depend upon the incidental fact that the exception for labor picketing appeared in the same provision of Illinois law as the picketing ban itself.

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[8] The Illinois statute provided as follows:

> It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interests.

Ill. Rev. Stat. ch. 38, § 21.1-2 (1977).

A law that subjects individuals to impermissibly discriminatory restrictions violates equal protection regardless of whether the source of the discrimination be an explicit exception to the prohibition itself, *e.g., Carey*, an exemption in a separate statutory provision, *e.g., Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. 1722 (1987) (state tax scheme), the interplay of laws from different jurisdictions, *cf. Armco Inc. v. Hardesty*, 467 U.S. 638, 644-45 (1984) (examining combined effect, on complaining manufacturer, of tax laws in different states, to illustrate that West Virginia wholesale gross receipts tax discriminates against interstate commerce), or the actual application of the law, *e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (restriction on laundry facilities applied almost exclusively against Chinese subjects). As this Court held in *Yick Wo*, "whatever may have been the intent of the ordinances as adopted," the resulting restrictions may

> amount to a practical denial by the State of that equal protection of the laws which is secured . . . by the . . . Fourteenth Amendment . . . . Though the law itself be fair on its face and impartial in appearance, yet, if it is applied . . . so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

118 U.S. at 373-74 (citations omitted).

A contrary rule — that a challenged law must be examined in sterile, abstract isolation — would permit governmental bodies to evade the strictures of the equal protection clause simply by employing various legislative drafting devices, or by disregarding (or manipulating) the combined effect of separate laws.

Such technical ploys cannot circumvent the right to equal protection. If Illinois, for example, in order to avoid the *Carey* decision, had reenacted its labor exception as a separate statute (e.g., "any provision to the contrary notwithstanding, peaceful picketing at a place of employment involved in a

labor dispute shall be legal"), a separate, facially complete ban on residential picketing would still be unconstitutionally discriminatory. The ban would be discriminatory, despite the absence of an explicit labor exception, because the independently existing authorization of labor picketing would effectively limit the application of the picketing ban to nonlabor picketing. The net effect would be content-based discrimination indistinguishable from that overturned in *Carey*. The State, in short, could not circumvent and frustrate the *Carey* rule by the merely formal device of enacting the unconstitutional law in two distinct pieces.

In the present case, therefore, if the challenged ordinance generally bans residential picketing, but does not apply to certain labor picketing, the ordinance denies nonlabor picketers the equal protection of the laws. It makes no difference, for constitutional purposes, whether the labor exemption arises from an exception in the anti-picketing ordinance, or from a preemptive state law. Nor does it matter whether the town intended to exempt certain labor picketing, or is simply powerless to apply its ban to such picketing.

As the following section illustrates, the rule of *Carey* governs the instant case because the Brookfield ban, by force of superior state labor law, cannot apply to the peaceful picketing of a residence which is also a place of employment involved in a labor dispute.[9]

b. *Despite its absolute terms, the Brookfield ban cannot apply to certain labor picketing authorized under state law.*

The Brookfield ban appears on its face to be content-neutral and completely without exception in its application. As a municipal ordinance, however, the anti-picketing law is subject to higher legal authority, such as state and federal statutes. In the present case, the picketing ban may not, as a matter of state law, apply to the peaceful picketing of a place of employment involved in a labor dispute.

[9] Although the town may have had the *intent* to prohibit all picketing, including labor picketing, it nevertheless lacked the *power* to do so. The district court therefore erred when it focused exclusively upon the legislative history and intent of the town in analyzing the equal protection issue. *See* 619 F. Supp. at 796. J.S. at A-17.

The impact of state law in the present case is clear:[10] Wisconsin labor law sanctions the peaceful picketing of a place of employment (including a residence) involved in a labor dispute; the Brookfield anti-picketing ordinance prohibits, *inter alia*, such picketing, and to that extent conflicts directly with the state labor statute; hence, the Brookfield ordinance must yield to the superior state law, and cannot apply to the peaceful picketing of a place of employment involved in a labor dispute.

i. Wisconsin labor law explicitly sanctions peaceful picketing on public ways, and this law applies to the peaceful picketing of a residence which is a place of employment involved in a labor dispute.

Wisconsin statutes regulating labor relations explicitly authorize peaceful picketing on public streets, and this statutory authorization applies to residential labor picketing when

[10] The clarity of state law makes abstention and certification inappropriate. As this Court recently observed in *City of Houston, Texas v. Hill*, 107 S. Ct. 2502, 2514 (1987), "when a statute is not ambiguous, there is no need to abstain even if state courts have never interpreted the statute."

Abstention is even less appropriate when, as in the present case, the state supreme court has applied the state labor statute in the context relevant to this case, namely, a place of employment which is a residence and which is involved in a labor dispute. *See infra* § II(B)(1). *See also City of Houston, Texas v. Hill*, 107 S. Ct. at 2514 ("It would be manifestly unfair to certify a question in a case where, as here, there is no uncertain question of state law whose resolution might affect the pending federal claim"). Furthermore, abstention would not preclude a court from issuing interim injunctive relief pending state adjudication, *see Harrison v. NAACP*, 360 U.S. 167, 179 (1959) (ordering abstention) ("the District Court of course possesses ample authority . . . to protect the appellees while this case goes forward"); hence, abstention arguments have no bearing on the present review of a preliminary injunction.

the residence is a place of employment involved in a labor dispute.

Wisconsin provides express statutory protection to certain conduct during labor disputes. In particular, state law sanctions peaceful picketing in public streets and other public ways:

> (1) The following acts, whether performed singly or in concert, shall be legal:
>
> * * *
>
> (e) Giving publicity to and obtaining or communicating information regarding the existence of the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof;
>
> * * *
>
> (g) Assembling peaceably to do or to organize to do any of the acts heretofore specified or to promote lawful interests;
>
> * * *
>
> (l) Peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal.

Wis. Stat. § 103.53(1).[11]

This statutory protection for peaceful picketing applies to the picketing of a residence which is a place of employment involved in a labor dispute. In *Senn v. Tile Layers Protective Union*, 222 Wis. 383, 268 N.W. 270 (1936), *aff'd*, 301 U.S. 468 (1937), the Supreme Court of Wisconsin upheld, as an exercise of "rights under the acts of the legislature," 222 Wis. at 390, 268 N.W. at 273, the peaceful union picketing of a tile contractor whose "business was . . . conducted, in the main, from his residence," 301 U.S. at 473. In *Senn*, the union "put in front of [Senn's] house two men carrying signs . . . [a]nd regularly from eight in the morning until noon and from one to four in the afternoon it carried on picketing of that sort, sometimes using four men." 301 U.S. at 485 (Butler, J., dissenting).[12] Neither the majority nor the dissenters, in this Court or in the state supreme court, contested the proposition that the labor statutes protected picketing on public streets outside a residence as well as on any other streets. Nor has the Supreme Court of Wisconsin subsequently questioned the *Senn* decision on this point.[13]

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[11] These provisions do not apply to labor picketing in the absence of a labor dispute; on the contrary, Wisconsin law prohibits such picketing. *See* Wis. Stat. § 103.535 (unlawful to picket when no labor dispute exists).

[12] That the picketing took place at Senn's residence was neither a matter of factual dispute nor the basis for the legal controversy. The litigation centered around two questions: whether a labor dispute existed under state law, and whether the economic pressures sanctioned under Wisconsin law violated the fourteenth amendment. The fact that the picketing involved a residence was treated as incidental, with both the state supreme court and this Court referring almost exclusively to the situs of the picketing as Senn's place of business. *Compare* 301 U.S. at 475 n.2 ("the unions had caused his automobile to be followed from his place of business to the jobs") *with id.* (continuing preceding quotation) ("the unions agreed . . . that thereafter they would not pursue plaintiff's automobile from his residence to his jobs").

[13] On the contrary, in *City of Wauwatosa v. King*, 49 Wis. 2d 398, 182 N.W.2d 530 (1971), the state supreme court stated that to "permit picket-

(cont'd)

ii. The Brookfield picketing ban cannot be applied to prohibit peaceful labor picketing protected under state law.

The Town of Brookfield, as a local governmental body, lacks the authority to outlaw labor picketing protected under state law. Consequently, the Brookfield picketing ban cannot apply to the peaceful picketing of a place of employment (including a residence) involved in a labor dispute.

Under Wisconsin law, a town can acquire a certain legislative capacity by assuming the powers of a village. *See* Wis. Stat. § 60.10(2)(c). Villages, in turn, have a limited authority "to determine their local affairs and government . . ." Wis. Const. art. XI, § 3.

This authority, however, must yield to contrary state legislation in two instances relevant to the present case. First, village (and thus town) "ordinances under the police power must be consistent and not in conflict with the law of the state." *City of Fond du Lac v. Town of Empire*, 273 Wis. 333, 339, 77 N.W.2d 699, 702 (1956). Second, village (and thus town) ordinances are "subject . . . to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village." Wis. Const. art. XI § 3.

As a conflicting police power regulation,[14] the Brookfield ban must give way to the state authorization of certain labor picketing. Regardless of whether the ordinance, viewed in isolation, would be a valid exercise of local authority, it cannot apply to the peaceful picketing of a place of employment involved in a labor dispute. The state has granted statutory protection to such picketing, including picketing outside a residence, and the town "cannot ' " . . . lawfully forbid what

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ing of a place of employment regardless of whether or not it is located in a residential property" was to "assur[e] equal protection" for those employees whose place of employment was in or adjoined a residence. *Id.* at 414, 182 N.W.2d at 538.

[14] The town defends its ordinance as an exercise of the police power. *See* e.g., Brief for Appellants at 31 (asserting safety and privacy concerns).

the legislature has expressly licensed, authorized or required," ' " *Wisconsin's Environmental Decade, Inc. v. Department of Natural Resources*, 85 Wis. 2d 518, 529, 271 N.W.2d 69, 74 (1978) (quoting *Fox v. City of Racine*, 225 Wis. 542, 545, 275 N.W. 513, 514 (1937)). Hence, the Brookfield ban cannot, as a matter of state law, apply to labor picketing protected under state statutes.[15]

Moreover, the anti-picketing ordinance must give way to inconsistent state legislation on a matter of state-wide concern. Labor regulation is plainly a matter of state-wide concern, *see* Wis. Stat. § 103.51 (declaring the "public policy of the state" regarding collective bargaining, and specifically applying this state policy to, *inter alia*, section 103.53); Wis. Stat. § 111.01 (declaring the "public policy of the state as to employment relations and collective bargaining"); *see generally* Wis. Stat. §§ 103.01-103.97, 111.01-111.94 (comprehensive state labor legislation). Consequently, the ability of a municipality to act in the area of labor relations faces sharp limitations. *See Anchor Savings and Loan Association v. Equal Opportunities Commission*, 120 Wis. 2d 391, 355 N.W.2d 234 (1984).[16] Under *Anchor Savings*, a local law must

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[15] An ordinance inconsistent with a state statute is "void so far as it" actually conflicts. *Voss v. Lenerz*, 256 Wis. 183, 187, 40 N.W.2d 519, 520, (1949).

[16] The *Anchor Savings* Court recognized a general four-pronged test for state preemption of local law. Under this test, state legislation "would necessarily nullify the local ordinance" if:

> (1) . . . the legislature has expressly withdrawn the power of municipalities to act;
>
> (2) . . . the ordinance logically conflicts with the State legislation;
>
> (3) . . . the ordinance defeats the purpose of the State legislation; or
>
> (4) . . . the ordinance goes against the spirit of the State legislation.

120 Wis. 2d at 397, 355 N.W.2d at 238.

yield to state legislation not only when it actually conflicts with that legislation, but also if it even goes "contrary to the spirit" of the state regulatory scheme. *Id.* at 402, 355 N.W.2d at 240.

As applied to the peaceful picketing of a place of employment involved in a labor dispute, the Brookfield picketing ban obviously not only violates the "spirit" of state labor law, which expressly protects such picketing, but also directly conflicts with the relevant state legislation. Thus the Brookfield ordinance, as a matter of state preemption[17] in an area of statewide concern, cannot apply to the peaceful picketing of a place of employment involved in a labor dispute.[18]

The Brookfield picketing ban cannot outlaw that which the state has protected. Consequently the ordinance, though neutral on its face, cannot apply to the peaceful picketing of a place of employment involved in a labor dispute.

Under the principles of *Carey v. Brown*, the Brookfield ordinance is likely to be unconstitutional as applied to nonlabor picketers, such as the appellees, who seek to picket in public streets.[19]

[17] If federal labor law were to preempt the Wisconsin labor picketing statutes, federal law would likewise preempt the Brookfield ordinance. Thus federal labor law, rather than state labor law, would prevent the application of the Brookfield ordinance to certain labor picketing. In either case, the same impermissible discrimination would result.

[18] "The law is well established that where a state act fully covers a subject or the state otherwise manifests a purpose to establish a uniform state rule pertaining to it, conflicting local ordinances on the same subject are invalid to the extent of the conflict." *Volunteers of America Care Facilities v. Village of Brown Deer*, 97 Wis. 2d 619, 622, 294 N.W.2d 44, 46 (Ct. App. 1980).

[19] This is not to say the town is wholly powerless to regulate picketing without running afoul of the equal protection clause of the fourteenth amendment. The statutory protection of labor picketing, which obviously conflicts with a total *ban* on picketing, would not necessarily conflict with — and thus preempt — reasonable regulation of the time, place, and manner of picketing. If the town, by employing reasonable regulations, were to avoid a conflict with state law, its regulation would have uniform application, eliminating the problem of impermissible discrimination.

2. *The Brookfield ban on all residential picketing, including peaceful public issue picketing on public streets, violates the constitutional right to free speech.*

The picketers are likely to prevail in their challenge to the Brookfield picketing ban because that ban likely violates the right to free speech.

The picketers wish to be free to engage in peaceful, orderly, public issue picketing on a public street in the Town of Brookfield, Wisconsin. Their intended activity receives constitutional protection under the first amendment to the United States Constitution (as incorporated through the fourteenth amendment), and the town has not offered sufficient justification for wholly banning this expressive activity.

Analysis of the picketers' free speech claim proceeds in three steps. *See Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 797 (1985). First, the Court must determine whether the picketers' intended activity represents speech protected under the first amendment. *Id.* Next, the Court "must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Id.* Finally, the Court must ascertain whether the asserted justifications for the exclusion of expressive activity satisfy the relevant standard. *Id.*

Application of this analysis to the present case illustrates the permissibility as well as the necessity of a preliminary injunction upholding the picketers' rights.

a. *Peaceful picketing constitutes expressive activity under the first amendment.*

First, the picketers' intended activity — peaceful picketing — plainly constitutes protected expression. "There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment." *United States v. Grace*, 461 U.S. 171, 176-77 (1983) (and cases cited).

In particular, "[t]here can be no doubt that . . . peaceful picketing on the public streets and sidewalks in residential neighborhoods . . . [constitutes] expressive conduct that falls within the First Amendment's preserve." *Carey v. Brown,* 447 U.S. 455, 460 (1980) (citing *Thornhill v. Alabama,* 310 U.S. 88 (1940); *Gregory v. Chicago,* 394 U.S. 111 (1969); *Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969)). Moreover, "[p]ublic issue picketing, 'an exercise of . . . basic constitutional rights in their most pristine and classic form,' . . . has always rested on the highest rung of the hierarchy of First Amendment values . . ." *Carey,* 447 U.S. at 466-67 (quoting *Edwards v. South Carolina,* 372 U.S. 229, 235 (1963)) (additional citations omitted).

b. *Public streets, including public streets in residential neighborhoods, are quintessential public fora.*

Second, the public street on which the picketers wish to picket plainly constitutes a public forum. *Carey,* 447 U.S. at 460-61 (public streets and sidewalks in residential neighborhoods are public forum property).

As long ago as the case of *Hague v. CIO,* 307 U.S. 496 (1939), this Court has recognized that

> [w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Id. at 515 (plurality opinion).

This Court has, for purposes of free speech analysis, identified public places of this kind as "public fora." Streets, sidewalks, and parks represent the "quintessential public

forums." *Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37, 45 (1983). On the range of properties open in varying degrees to expressive activities, streets and parks lie at the very "end of the spectrum," *id.;* hence, "[o]ne who is rightfully on a street open to the public 'carries with him there as elsewhere the constitutional right to express his views in an orderly fashion.' " *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 810 (1984) (quoting *Jamison v. Texas,* 318 U.S. 413, 416 (1943)) (additional citation omitted). *Accord United States v. Grace,* 461 U.S. 171, 177 (1983) (" 'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums' ") (and cases cited); *Cornelius,* 473 U.S. at 802 (traditional public fora include public streets and parks).

Indeed, municipal streets and sidewalks set the standard for public forum property. Thus, when this Court reviews an asserted right of access for purposes of free expression, the crucial question is typically whether the forum at issue is sufficiently analogous to municipal streets so as to constitute a public forum. *E.g., Marsh v. Alabama,* 326 U.S. 501 (1946) (streets and sidewalks of company town indistinguishable from municipal streets and sidewalks); *Flower v. United States,* 407 U.S. 197 (1972) (per curiam) (street and adjoining sidewalks through military facility indistinguishable from municipal thoroughfare); *Hudgens v. NLRB,* 424 U.S. 507 (1976) (shopping mall not functional equivalent of municipality); *Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640 (1981) (state fairgrounds significantly different from municipal streets); *United States v. Grace,* 461 U.S. 171 (1983) (sidewalk on perimeter of Supreme Court grounds indistinguishable from other city sidewalks).

The decisions of this Court, furthermore, do not limit the category of public forum property so as to exclude residential streets and sidewalks. *E.g. Cantwell v. Connecticut,* 310 U.S. 296, 308 (1940) (Jehovah's Witness going door-to-door in residential neighborhood "was upon a public street, where he had a right to be, and where he had a right peacefully to

impart his views to others"); *Gregory v. City of Chicago,* 394 U.S. 111 (1969) (peaceful march to mayor's residence and demonstration on neighboring streets and sidewalks "well within" scope of first amendment); *Carey v. Brown,* 447 U.S. 455 (1980) (picketing on residential streets and sidewalks is expression in a public forum).

The public forum status of residential streets and sidewalks was a central premise underlying the *Carey* decision. *See Perry,* 460 U.S. at 55 (discussing *Carey* and another case) ("the key to those decisions . . . was the presence of a public forum"). In *Carey,* this Court struck down an anti-residential picketing statute under the equal protection clause of the fourteenth amendment because it "discriminate[d] among speech-related activities *in a public forum," id.* at 461 (emphasis added). Had the residential streets and sidewalks in question not been public fora, a very different — and less demanding — standard of scrutiny would have applied. *See e.g., Cornelius,* 473 U.S. at 806; *Perry,* 460 U.S. at 46.

In the present case, the town attempts to challenge the public forum status of its residential streets. *See* Brief for Appellants at 21-27. In light of the overwhelming Supreme Court precedent to the contrary (which the town acknowledges, *id.* at 21), it is unclear from what source the town anticipates conjuring up this major change in established constitutional doctrine.

A town "may not by its own ipse dixit destroy the 'public forum' status of streets and parks," *USPS v. Greenburgh Civic Association,* 453 U.S. 114, 133 (1981), and the town has presented no evidence to suggest that its streets are radically different from those of any other municipality.

Nor has the town advanced a coherent argument to justify its revolutionary claim.

The town asserts that there is no proof of government ownership of the street in question. Ownership of the street, however, is irrelevant: *"[w]herever* the title of streets and parks may rest," *Hague,* 307 U.S. at 515 (emphasis added), these properties are "freely accessible and open to the people in the area and those passing through," *Marsh v. Alabama,* 326 U.S. at 507. It is this openness "for indiscriminate use by the

general public, " *Perry,* 460 U.S. at 47, this "traditional right of access," *Taxpayers for Vincent,* 466 U.S. at 814, that characterizes public forum property.

As with the sidewalks surrounding the Supreme Court grounds in *Grace,* "[t]here is no indication whatever to persons stepping [into the residential streets of the Town of Brookfield] that they have entered some special type of enclave." 461 U.S. at 180. The record gives no support whatsoever to the notion that anyone needs a passport, a visa, or a license to stroll the streets of the Town of Brookfield.

The town also claims that as a historical matter, its residential streets have never been held open for picketing or other use by members of the general public. Brief for Appellants at 23-24, 27. There is no record support for this contention.[20] Moreover, it is simply not the case that a particular public street must have a history of specific expressive activities before it can be considered a public forum. In *Marsh* and *Flower,* there was no indication that other individuals had previously distributed literature on the streets in question. In *Gregory* and *Carey,* the Court saw no need to inquire whether previous demonstrations of any sort had taken place outside the residence of the mayor. Indeed, in *Hague v. CIO,* there was "no competent proof that the parks of Jersey City are dedicated to any general purpose other than the recreation of the public," 307 U.S. at 505; the Court nevertheless ruled that streets and parks have, "time out of mind," been used for purposes of free expression, *id.* at 515. In short, it is the nature of a public street in general — not its own particular history regarding marches, literature distribution, or picketing — that renders it a public forum.

Finally, the town cites *Cornelius v. NAACP Legal Defense Fund, Inc.,* 473 U.S. 788 (1985), for the proposition that traditional forum analysis does not apply, and that the question is whether a "picketing forum" exists. Brief for Appellants at 24-27. This argument misconceives the *Cornelius* decision.

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[20] Indeed, the town apparently felt powerless to exclude the picketers in the present case before it enacted the challenged ordinance.

Cornelius involved a claim of access to the Combined Federal Campaign (CFC). The excluded parties sought a right, not to enter the federal workplace, but to participate in the CFC program. 473 U.S. at 801. At issue, therefore, was access to a channel of communication, not a particular piece of property. The Court employed "a more tailored approach" to the access question precisely because the case differed from those involving streets and parks. *Id.* Indeed, the Court specifically noted that "[w]hen speakers seek general access to public property, the forum encompasses that property." *Id.* (citation omitted). Hence, the "activity analysis" applied to the facts of *Cornelius* does not apply to the case at bar.

Absent a revolution in constitutional jurisprudence, then, the picketers' intended activity represents constitutionally protected expressive activity in a public forum. The only remaining question is the sufficiency of the town's asserted justifications for banning the picketers.

c. *The Brookfield ban on expressive activity in a public forum is not narrowly tailored to further a significant government interest.*

The first amendment standard is well-established. In public fora,

> the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication" . . . Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest.

Grace, 461 U.S. at 177 (quoting *Perry*, 460 U.S. at 45) (additional citations omitted).

The Brookfield ban absolutely prohibits all picketing in a public forum, and thus cannot constitute a reasonable time, place, and manner regulation.[21]

The town offers in defense of the picketing ban its interests in safety and residential privacy. Brief for Appellants at 31. Neither interest provides an appropriate or adequate justification for the anti-picketing law in question.

i. Safety concerns do not justify the Brookfield picketing ban.

The town's interest in maintaining public safety does not justify the anti-picketing law at issue here. A ban on all picketers, and only picketers, bears no logical relationship to safety concerns.

In the first place, there is no evidence to support a conclusion that people who are picketing create any greater hazards than do people who are marching in groups carrying signs — yet the Town concedes the lawfulness of this latter activity, *see* Brief for Appellants at 41.

Nor is there any evidence to indicate that picketing is any more hazardous than any other pedestrian activity on public streets, such as strolling, jogging, or recreation. Yet the town has arbitrarily singled out a particular expressive pedestrian activity for legal prohibition. The Brookfield picketing ban neither limits itself to unsafe pedestrian activity nor ap-

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[21] Because the Brookfield ordinance wholly bans a particular type of expression, it is an "additional restriction" — one which exceeds mere reasonable regulation — which triggers strict scrutiny. *Grace*, 461 U.S. at 177. *Cf. Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 n.16 (1981). Since, as described in the text, the ordinance fails the "narrowly tailored" test for reasonable time, place, and manner regulations, it follows that the ordinance also is not "narrowly drawn" and therefore fails to survive strict scrutiny.

plies evenhandedly to pedestrian hazards regardless of their communicative nature.

Moreover, if picketing actually did increase the risk of car accidents, this risk would be much more serious in the commercial areas of Brookfield, where traffic is both heavier and conducted at higher speeds. Yet the town proposes, and through its ordinance would require, that the picketers take their protest to these more dangerous areas. *See* J.S. at 31.

In *Carey v. Brown*, the Court observed that the "apparent overinclusiveness and underinclusiveness of the . . . restriction would seem largely to undermine [the] claim that the prohibition of all nonlabor picketing can be justified by reference to the State's interest in maintaining domestic tranquility." 447 U.S. at 465 (footnote omitted). The same basic deficiencies plague the town's attempt to justify its picketing ban in terms of public safety.

ii. Concern for residential privacy does not justify the Brookfield picketing ban.

The town rests primarily upon the claim that concern for residential privacy justifies its picketing ban. This claim does not withstand constitutional analysis, however. Whatever residential privacy may mean,[22] it cannot support the total prohibition of peaceful expression in a public forum. Furthermore, the Brookfield ban is not narrowly tailored to advance the asserted interest.

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[22] The town has not defined residential privacy. Thus, there is a danger that the assertion of this vague term "privacy" might mask an effort by the town to suppress controversial speech or exclude a point of view with which some residents might disagree. The town has disavowed any desire to restrict the content of the picketers speech, *see* Brief for Appellants at 29-31; hence, the picketers assume that the town's privacy concerns only apply insofar as they have no reference to the impact of the picketers' message.

(a) Residential peace and privacy interests do not justify bans on expressive activity in public fora outside the private domain.

In the first place, the governmental interests in protecting residential peace and privacy do not extend outward from a given dwelling so as to swallow up all expressive rights in the vicinity. Rather, these interests are focused upon — and limited to — the dwelling itself and, to a lesser extent, the accompanying private grounds. Activity outside this residential locus is subject to governmental control only to the extent that it invades that locus.

Thus a municipality might prohibit "loud and raucous noises," *see Kovacs v. Cooper,* 336 U.S. 77 (1949) (sound trucks), because the sounds actually invade and disrupt the peace of a dwelling. Similarly, government may restrict radio broadcasts, *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978) (indecent language aired during daytime hours), and delivery of mailed materials, *Rowan v. United States Post Office Department,* 397 U.S. 728 (1970) (objectionable mailings), insofar as they involve actual intrusions into the home. Government may, in addition, exercise a more limited regulatory power over door-to-door communicative activities, *see Martin v. Struthers,* 319 U.S. 141 (1943) (flat ban on door-to-door literature distribution impermissible); *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980) (substantial limitation on charitable door-to-door solicitation unconstitutional).

When the communicative activity takes place on public ways or other locations outside the dwelling-place, however, residential peace and privacy concerns simply do not supply an adequate justification for government prohibitions. *E.g., Schaumburg,* 444 U.S. at 638-39 ("The ordinance is not directed to the unique privacy interests of persons residing on their homes because it applies not only to door-to-door solicitation, but also to solicitation on 'public streets and public ways' ")

(quoting ordinance); *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85, 94 (1977) (prohibiting the posting of "For Sale" and "Sold" signs on front lawns does not "restrict a mode of communication that 'intrudes on the privacy of the home [or] makes it impractical for the unwilling viewer or auditor to avoid exposure' ") (quoting *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 209 (1975));[23] *see also Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971) (peaceful leafletting in residential neighborhood may not be enjoined); *Gregory v. City of Chicago,* 394 U.S. 111 (1969) (peaceful, orderly singing and marching through residential neighborhood and around mayor's residence not constitutionally punishable).

A comparison of the *Rowan* and *Keefe* cases is illustrative. In *Rowan,* the issue was whether the federal government could "make the householder the exclusive and final judge of what will *cross his threshold* . . . " 397 U.S. at 736 (emphasis added). The Court unanimously upheld the governmental power to provide this kind of privacy safeguard, holding that a "mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736-37. The crucial point of the Court's decision was that unwanted mailings are a "form of tresspass," *id.* at 737; thus, the resident could bar such communication from "entering his home," *id.* The homeowner may "erect a wall" against this intrusion, *id.* at 738, because the "right of a mailer, we repeat, stops at the *outer boundary of every person's domain,*" *id.* (emphasis added).

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[23] If neither solicitation on the street outside a home nor the posting of signs on a neighbor's lawn threaten residential privacy, then it makes little sense to say that the combination of these two activities — carrying signs on the street in front of a home — can be inimical to residential privacy.

In the *Keefe* case, by contrast, an eight-member majority of the Court[24] (seven of whom joined in the *Rowan* decision) summarily rejected residential privacy as a justification for banning peaceful residential leafletting.

> Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record. *Rowan* . . ., relied on by respondent, is not in point; *the right of privacy involved in that case is not shown here.* Among other important distinctions, respondent is not attempting to stop the flow of information *into his own household,* but to the public.

402 U.S. at 419-20 (emphasis added).

The interest of the Town of Brookfield in protecting peace and privacy in the home, then, is simply inapposite to the present case. The town may, of course, legitimately regulate conduct which actually intrudes upon the residential domain. In fact, the town already has ordinances prohibiting: trespass to land and dwellings, making loud and unnecessary noises disruptive of private residences, destroying private property, and littering on private property. Town of Brookfield, Wis., Gen. Code, §§ 9.943.13, 9.943.14, 9.06, 9.09, 9.10. *See* Addendum.

The town does not, however, have license to ban peaceful, orderly picketing in public areas under the guise of protecting residential peace and privacy. The true goal of the Brookfield ban — to prevent "embarrassment and intimidation" of

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[24] Justice Harlan dissented on jurisdictional grounds.

the picketed resident — simply does not supply a legitimate justification for a ban on speech. "Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982). As this Court explained in the *Keefe* case,

> [t]he claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners [the leafletters] plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. *See Schneider v. State*, [308 U.S. 147 (1939)]; *Thornhill v. Alabama*, 310 U.S. 88 (1940). Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.

402 U.S. at 419.

(b) The Brookfield ban is not narrowly tailored to advance the asserted interests.

Aside from the constitutional impropriety of extending residential peace and privacy concerns beyond their proper domain and into public fora, there is a second fatal deficiency in the proffered justifications of the Brookfield ban: the ordinance is not narrowly tailored to further those interests.

Under the constitutional standards relevant to the regulation of expressive conduct in a public forum, reasonable time, place, and manner regulations must be "narrowly tailored" to serve the relevant government interests, and flat bans on a given type of expression must be "narrowly drawn" to further a compelling interest. *United States v. Grace*, 461 U.S. 171, 177 (1983).

These requirements of narrow regulation reflect the principle that in the area of first amendment rights, the state may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982) (and cases cited). Constitutional rights would be meaningless if the state could sweep them away in the wake of broad laws. The Constitution, therefore, requires government to act with sensitivity to these rights and to allow their full exercise except where their restriction is essential to further an interest of sufficient weight.

Thus, for a law restricting conduct in a public forum to be narrowly tailored, it must "aim specifically at evils within the allowable area of State control [and not], on the contrary, sweep[] within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940).

In *Edwards v. South Carolina*, 372 U.S. 229 (1963), the Court overturned convictions under a broad prohibition against breaches of the peace, contrasting such a broad offense with "a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or prescribed." *Id.* at 236. Examples of the latter, according to the Court, would include "a law regulating traffic" or "a law reasonably limiting the periods" of public access to a certain area. *Id.*

In *Martin v. Struthers*, 319 U.S. 141 (1943), the Court limited a municipality to "traditional legal methods" for controlling criminal activities, declaring that a "stringent prohibition (on door-to-door solicitation) can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." *Id.* at 147.

In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Court listed as examples of narrowly tailored regulations laws which limited the number of parades at the same time, or forbade parades on busy streets during rush hour, or outlawed exces-

sive noise. *Id.* at 115-16. The anti-noise ordinance in *Grayned* was such a permissible regulation, the Court held, because it prohibited "only conduct which disrupts or is about to disrupt normal school activities," *id.* at 119, namely noise, during a school session or class, which "disturbs or tends to disturb" the school session or class, *see id.* at 107-08 (quoting ordinance). The *Grayned* Court explicitly noted that "[p]eaceful picketing which does not interfere with the ordinary functioning of the school is permitted." *Id.* at 119.

In short, for a law affecting free speech to be narrowly tailored, it must address a specific, objective evil in a direct and evenhanded manner. Impermissible are shortcut or backdoor approaches, dragnet prohibitions, and laws which aim directly at expressive activity and only indirectly address legitimate regulatory concerns. As this Court stated in *De Jonge v. State of Oregon,* 299 U.S. 353, 364 (1931):

> The people through their legislatures may protect themselves against th[e] abuse [of rights to free speech and assembly]. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.

Viewed in light of these general principles, the Brookfield ban manifestly fails the requirement of narrow tailoring.

(i) The Brookfield ban does not limit itself to regulating abuses, but instead broadly proscribes expressive activity.

The Brookfield ban demonstrates no sensitivity to constitutional rights. The anti-picketing ordinance completely bans any and all residential picketing, instead of confining itself to abusive conduct.

The town claims the ban is necessary to protect residential safety and privacy. But the ordinance does not prohibit violent, unsafe, or disorderly behavior. Instead, the Brook-

field ban only outlaws picketing, and all picketing, regardless of whether it is peaceful and orderly, or disruptive and abusive.[25] The Brookfield ban thus makes picketing itself the object of its legal animosity, instead of addressing abusive behavior that may or may not be associated with picketing.[26]

The Brookfield ban makes no distinctions and allows for no exceptions in its prohibitory application. While content-based exceptions are, of course, inimical to equal protection, *Carey v. Brown,* 447 U.S. 455 (1980); *Police Department of City of Chicago v. Mosley,* 408 U.S. 92 (1972); *see also supra* § III(B)(1), content-neutral specifications are essential to the narrowing of an otherwise overbroad law. The Brookfield ban, however, makes no effort to distinguish between peaceful picketing and disorderly picketing, between picketing in small numbers or in crowds, between picketing on public streets and sidewalks or on private property, between picketing for a short time or at all hours of the day or night, between picketing on less-traveled roads or on busy thoroughfares. Each of these features bears heavily upon the government interests in safety and privacy. Yet the flat ban the town enacted gives not the slightest heed to any such factors. While laws need not attain microscopic precision, the Brookfield ban presents the opposite extreme of complete insensitivity to the rights and interests at stake.

Gregory v. City of Chicago, 394 U.S. 111 (1969), illustrates the patent invalidity of the Brookfield ban. In *Gregory,* former

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[25] In fact, the most prominent alleged occurrences to which the town objects — scaring children with reports of a baby-killer, blocking cars entering or leaving driveways, shouting, and tying ribbons on private property, *see* J.S. at A-10 to A-12 (opinion of district court) — do not constitute violations of the anti-picketing ordinance. The town has proceeded in an unconstitutionally backwards fashion, outlawing the exercise of rights in order to prevent abuses.

[26] Indeed, in light of existing town ordinances prohibiting loitering, disorderly conduct, trespass, littering, loud noises, destruction of property, and obstruction of traffic, *see* Addendum, it appears that the picketing ban adds nothing except the prohibition of orderly, quiet, peaceful picketing in public places or on other premises by invitation.

Chief Justice Warren proclaimed that the facts presented "a simple case," 394 U.S. at 111, since the protesters' march from city hall to the mayor's residence, where they continued to demonstrate, "falls well within the sphere of conduct protected by the First Amendment," *id.* at 112.[27]

The *Gregory* case fits into an established first amendment jurisprudence that rejects sweeping and conclusory prohibitions on expressive activity in public fora, and that tolerates only laws which address specific unlawful aspects of the behavior in question. *Compare Lovell v. Griffin,* 303 U.S. 444 (1938) (overturning blanket, wholly discretionary permit requirement for literature distribution); *Thornhill v. Alabama,* 310 U.S. 88 (1940) (overturning flat ban on loitering or picketing at a place of business); *Edwards v. South Carolina,* 372 U.S. 229 (1963) (overturning breach of peace convictions for peaceful demonstration on statehouse grounds); *Cox v. Louisiana (Cox I),* 379 U.S. 536 (1965) (overturning breach of peace conviction for peaceful march to and demonstration at courthouse; overturning ban on obstruction of public passages where enforcement left to unbridled discretion of authorities); *Gregory v. City of Chicago,* 394 U.S. 111 (1969) (overturning disorderly conduct convictions for peaceful march to and demonstration around residential block); *Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969) (overturning blanket, wholly discretionary permit requirement for parades and demonstrations); *Organizations for a Better Austin v. Keefe,* 402 U.S. 415 (1971) (overturning blanket injunction against residential leafletting); *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980) (overturning flat ban on charitable solicitation, door-to-door or on public ways, by organizations that do not use at least 75% of receipts for charitable purposes); *NAACP v. Claiborne Hardware Co.,* 458 U.S.

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[27] The facts in *Gregory* were as follows: 85 protestors marched to the mayor's home, arriving at about 8 p.m. They chanted and sang while marching around the block, using streets and sidewalks. At 8:30 p.m., the demonstrators stopped singing and chanting, and marched silently until their arrest and dispersion by police at 9:30 p.m. *See* 394 U.S. at 126-30 (Appendix to opinion of Black, J., concurring).

886 (1982) (overturning civil liability imposed for nonviolent political boycott and associated speeches and nonviolent picketing); *United States v. Grace,* 461 U.S. 171 (1983) (overturning flat ban on picketing and leafletting as applied to public sidewalks outside Supreme Court Building); *with Cox v. New Hampshire,* 312 U.S. 569 (1941) (upholding parade licensing requirement insofar as fairly and nondiscriminatorily applied solely to address traffic concerns and not applicable to peaceful picketing); *Cox v. Louisiana (Cox II),* 379 U.S. 559 (1965) (upholding against facial challenge ban on courthouse picketing "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty"); *Adderly v. Florida,* 385 U.S. 39 (1966) (upholding trespassing law as applied to picketing on jailhouse grounds; state "aimed at conduct of one limited kind," namely, trespassing on nonpublic forum jail grounds); *Cameron v. Johnson,* 390 U.S. 611 (upholding against facial challenge ban on picketing or mass demonstrations which obstruct or unreasonably interfere with ingress, egress, use of public ways, transaction of business or administration of justice); *Grayned v. City of Rockford,* 408 U.S. 104 (1972) (upholding ban on willful making of noise "which disturbs or tends to disturb" school peace and good order); *Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640 (1981) (upholding state fair rule limiting solicitation of donations and sale or distribution of literature to specified locations within limited public forum of state fairgrounds: rule does not "deny . . . the right to conduct any desired activity at some point within the forum").

By sheer force of repetition, this long line of decisions firmly establishes the impropriety of "broad prophylactic rules," and the requirement that regulations address only specific, harmful aspects of expressive behavior.

Thus, as a ban on all residential picketing, including peaceful picketing in a public forum, the Brookfield ordinance is patently unconstitutional. *Accord Pursley v. City of Fayetteville, Arkansas,* 820 F.2d 951 (8th Cir. 1987), *reh'g and reh'g en banc denied,* No. 86-1332 WA (8th Cir. Aug. 28, 1987); *State v.*

Schuller, 280 Md. 305, 372 A.2d 1076 (1977); *State v. Anonymous*, 6 Conn. Cir. 372, 274 A.2d 897 (1971); *Flores v. City and County of Denver*, 122 Colo. 71, 220 P.2d 373 (1950) (en banc); *Hibbs v. Neighborhood Organization to Rejuvenate Tenant Housing*, 433 Pa. 578, 272 A.2d 622 (1969).

(ii) Picketing is not inherently proscribable.

The town apparently recognizes the radical nature of its ordinance, and thus to defend the ordinance the town takes a radical legal position: *all* picketing is *inherently* so disruptive of residential well-being and privacy that a flat ban is justified. *See* Brief for Appellants at 34-40.

The town's position, however, calls for a major departure from established constitutional jurisprudence. As long ago as 1940, this Court refused to consider picketing per se to be a breach of lawfulness sufficient to justify its prohibition.

> [N]o clear and present danger of destruction of life or property or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter.

Thornhill v. Alabama, 310 U.S. 88, 105 (1940) (overturning picketing ban). Subsequent cases have reaffirmed this principle in such varied settings as outside a home, *Carey v. Brown*, 447 U.S. at 469 ("Numerous types of peaceful picketing other than labor picketing would have but a negligible impact on privacy interests") (footnote omitted), a school, *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972) ("it would be highly unusual if the classic expressive gesture of the solitary picket disrupts anything related to the school, at least on a public sidewalk open to pedestrians") (footnote omitted), and a courthouse, *Grace*, 461 U.S. at 182 ("A total ban on [picketing and other communicative activity] is no more necessary for the maintenance of peace and tranquility on the

public sidewalks surrounding the [Supreme Court] building than on any other sidewalks in the city").

Moreover, the revision in constitutional law necessary to uphold the town's position would leave first amendment jurisprudence in a state of confusion and disarray.

The distinction between a picket and a march is by no means clear. The town concedes that a march, like that in *Gregory*, would be permitted. Brief for Appellants at 41. But in *Gregory*, the demonstrators carried signs and marched around and around a residential block. 394 U.S. at 126-30 (Appendix to opinion of Black, J., concurring). How far would the picketers have to walk before their picket became a march?

The distinction between a picket and the distribution of leaflets can also be unclear. The latter activity is plainly protected. *E.g., Schneider v. State*, 308 U.S. 147 (1939); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). If individuals going about the streets of Brookfield wear sandwich boards and hand out fliers, are they picketing?

Nor is it clear what a person has to do to qualify as a picketer. If the people involved in this case bore their messages on tee-shirts instead of signs, would they be picketers? If they held a silent vigil on the street in question for five minutes each day, without signs, would they be picketers?

These considerations illustrate the fundamental difficulty of the town's approach. Instead of enacting or enforcing laws aimed at conduct itself — i.e., laws which apply regardless of a person's intent to communicate — the town has targeted an activity that is defined by reference to its expressive purposes. In so doing, the town has crossed the constitutional line separating narrowly tailored time, place, and manner regulations from the direct suppression of free speech.

The Brookfield flat ban is not narrowly tailored to further significant government interests; it therefore fails the test for reasonable time, place and manner regulations of expressive activity. Whereas the town's defense of its anti-picketing ordinance rests upon calls for major revisions in constitutional law, the trial court properly found the picketers to have a

reasonable likelihood of success on the merits of their challenge to the ordinance.

CONCLUSION

The Court lacks appellate jurisdiction over the present case, and therefore should dismiss the appeal. Treating the appeal as a petition for certiorari, the Court should deny the petition. If the Court decides to grant review, it should affirm the judgment of the court of appeals.

Respectfully submitted,

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ADDENDUM: Selected Ordinances of the Town of Brookfield, Wis.

9.05 *OBSTRUCTING STREETS AND SIDEWALKS PROHIBITED.* No person shall stand, sit, loaf, loiter or engage in any sport or exercise on any public street, sidewalk, bridge or public ground within the Town in such manner as to prevent or obstruct the free passage of pedestrian or vehicular traffic thereon or to prevent or hinder free ingress or egress to or from any place of business or amusement, church, public hall or meeting place, except with the permission of the Town Board upon written application to the Board.

9.06 *LOUD AND UNNECESSARY NOISE PROHIBITED.* No person shall make or cause to be made any loud, disturbing or unnecessary sounds or noises such as may tend to annoy or disturb another in or about any public street, alley, park or any private residence.

9.08 *LOITERING PROHIBITED.* (1) LOITERING OR PROWLING. No person shall loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the person takes flight upon appearance of a police or peace officer, refuses to identify himself or manifestly endeavors to conceal himself or any object. Unless flight by the person or other circumstances makes it impracticable, a police or peace officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this subsection if the police or peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the person was true and, if believed by the police or peace officer at the time, would have dispelled the alarm.

(2) OBSTRUCTION OF HIGHWAY BY LOITERING. No person shall obstruct any street, bridge, sidewalk or crossings by lounging or loitering in or upon the same after being requested to move on by any police officer.

(3) OBSTRUCTION OF TRAFFIC BY LOITERING. No person shall loaf or loiter in groups or crowds upon the public streets, alleys, sidewalks, street crossings or bridges, or in any other public places within the Town, in such manner as to prevent, interfere with or obstruct the ordinary free use of the public streets, sidewalks, street crossings and bridges or other public places by persons passing along and over the same.

(4) LOITERING AFTER BEING REQUESTED TO MOVE. No person shall loaf or loiter in groups or crowds upon the public streets, sidewalks or adjacent doorways or entrances, street crossings or bridges or in any other public place or on any private premises without invitation from the owner or occupant, after being requested to move by any police officer or by any person in authority at such places.

9.09 *DESTRUCTION OF PROPERTY PROHIBITED.* No person shall willfully injure or intentionally deface, destroy or unlawfully remove, take or meddle with any property of any kind or nature belonging to the Town or its departments, or to any private person without the consent of the owner or proper authority.

9.10 *LITTERING PROHIBITED.* No person shall throw any glass, garbage, rubbish, waste, slop, dirty water or noxious liquid, or other litter or unwholesome substance upon the streets, alleys, highways, public parks or other property of the Town or upon any private property not owned by him or upon the surface of any body of water within the Town.

9.29.288 to 9.948.16 *OFFENSES AGAINST STATE LAW SUBJECT TO FORFEITURE.* The following statutes following the prefix "9" defining offenses against the peace and good order of the State are adopted by reference to define offenses against the peace and good order of the Town, provided the penalty for commission of such offenses hereunder shall be limited to a forfeiture imposed under § 25.04 of this Code.

9.943.13	Criminal Trespass to Land
9.943.14	Criminal Trespass to Dwelling
9.947.01	Disorderly Conduct